Supreme Court, U.S.
FILED
MAY 8 - 2006
OFFICE OF THE CLERK

No. 05-1424

In The
Supreme Court of the United States

METROPOLITAN LIFE INSURANCE COMPANY,

Petitioner,

v.

PEGGY HAWKINS-DEAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

GENE C. SCHAERR
WINSTON & STRAWN LLP
1700 K Street, N.W.
Washington, D.C. 20006
(202) 282-5000

LINDA T. COBERLY
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600

AMY K. POSNER
METROPOLITAN LIFE INSURANCE COMPANY
27-01 Queens Plaza North
Long Island City, New York 11101
(212) 578-8296

LEE T. PATERSON
Counsel of Record
AMANDA SOMMERFELD
WINSTON & STRAWN LLP
333 South Grand Avenue
Los Angeles, California 90071
(213) 615-1700

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred in reviewing *de novo*, in conflict with decisions in nine other Circuits, a benefit decision by an administrator of an ERISA-regulated plan that grants the administrator discretion in making benefit decisions?

2. Whether the Ninth Circuit erred in holding, in conflict with decisions in the First, Second, Fourth, Fifth, Seventh and Tenth Circuits that when a plan participant provides evidence tending to show a conflict of interest on the part of an administrator of an ERISA-regulated plan, the administrator, not the participant, bears the burden of proof as to whether a conflict of interest tainted the administrator's benefits decision.

3. Whether the Ninth Circuit erred in entering judgment awarding a disabled employee monthly benefits that far exceed her pre-disability earnings by including profits she realized from the sale of company stock shortly before she filed her claim.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings at the Ninth Circuit are the Petitioner-Defendant, Metropolitan Life Insurance Company, and the Respondent-Plaintiff, Peggy Hawkins-Dean. No judgment was entered by the district court against the employer, Robert Half International, and it was not a party to the appeal of the district court's judgment. There are no other parties.

RULE 29.6 STATEMENT

Petitioner, Metropolitan Life Insurance Company, is a wholly owned subsidiary of MetLife, Inc., which is a publicly traded company. No publicly held entity owns 10% or more of MetLife's stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
RULE 29.6 STATEMENT	ii
PETITION FOR A WRIT OF CERTIORARI	1
OPINION BELOW	1
JURISDICTION	1
STATUTES AND REGULATIONS INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	6
I. The Ninth Circuit's "Presumptively Void" Standard Of Review Warrants This Court's Review	7
A. The Ninth Circuit's Decision Squarely Conflicts With Decisions In Nine Other Circuits	9
B. The Ninth Circuit's Decision Is Contrary To This Court's Decision In *Firestone v. Bruch*	14
C. The Presumptively Void Rule Contravenes Congressional Purpose	16
D. The Court's Resolution Of This Issue Is Vital And This Case Is An Ideal Vehicle For Resolving It	17
II. The Ninth Circuit's Rule Shifting The Burden Of Proof Likewise Merits This Court's Review	21

TABLE OF CONTENTS – Continued

Page

A. The Ninth Circuit's Rule Shifting The Burden To The Claim Administrator Is In Direct Conflict With Decisions Of Six Other Circuits 22

B. The Ninth Circuit's Shift Of The Burden Of Proof To The Claim Administrator Conflicts With Common Law 23

C. The Ninth Circuit's Categorical Rule Contravenes Congressional Goals And Is Based Upon Unsupported Generalizations 24

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES:

Abatie v. Alta Health & Life Insurance Co., 421 F.3d 1053 (9th Cir. 2005) 19

Alford v. DCH Foundation Group Long-Term Disability Plan, 311 F.3d 955 (9th Cir. 2002) 19

Ass'n of Data Processing Service Organizations, Inc. v. Board of Governors of Federal Reserve System, 745 F.2d 677 (D.C. Cir. 1984) 10

Atwood v. Newmont Gold Co., 45 F.3d 1317 (9th Cir. 1995) ..... *passim*

Bendixen v. Standard Insurance Co., 185 F.3d 939 (9th Cir. 1999) 18

Bergt v. Retirement Plan for Pilots Employed by Mark Air, Inc., 293 F.3d 1139 (9th Cir. 2002) 19

Block v. Pitney Bowes, Inc., 952 F.2d 1450 (D.C. Cir. 1992) 10, 11

Booth v. Wal-Mart Stores Inc., 201 F.3d 335 (4th Cir. 2000) 11

Boyd v. Bell, 410 F.3d 1173 (9th Cir. 2005) 19

Brown v. Blue Cross & Blue Shield, Inc., 898 F.2d 1566 (11th Cir. 1990) 8, 13

Brown v. Blue Cross & Blue Shield of Alabama, Inc., 898 F.2d 1556 (11th Cir. 1990) 17

Chalmers v. Quaker Oats Co., 61 F.3d 1340 (7th Cir. 1995) 26

Chambers v. Family Health Plan Corp., 100 F.3d 818 (10th Cir. 1996) 20

TABLE OF AUTHORITIES – Continued

Page

Colucci v. Agfa Corp. Severance Pay Plan, 431 F.3d 170 (4th Cir. 2005) 22

Cozzie v. Metropolitan Life Insurance Co., 140 F.3d 1104 (7th Cir. 1998) 26

Cuddington v. Northern Ind. Public Serv. Co., 33 F.3d 813 (7th Cir. 1994) 26

Doe v. Travelers Insurance Co., 167 F.3d 53 (1st Cir. 1999) 10, 17

Egelhoff v. Egelhoff, 532 U.S. 141 (2001) 17, 18

Ellis v. Liberty Life Assur. Co., 394 F.3d 262 (5th Cir. 2004) 22

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) ..... *passim*

Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987) 24

Fought v. UNUM Life Insurance Co. of America, 379 F.3d 997 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 1972 (2005) 12, 16, 22

Friedrich v. Intel Corp., 181 F.3d 1105 (9th Cir. 1999) 5, 8, 18

Gatti v. Reliance Standard Life Insurance Co., 415 F.3d 978 (9th Cir. 2005) 19

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990) 18

Jordan v. Northrop Grumman Corp. Welfare Benefit Plan, 370 F.3d 869 (9th Cir. 2004) 19

Kearney v. Standard Insurance Co., 175 F.3d 1084 (9th Cir. 1999) 18

TABLE OF AUTHORITIES – Continued

Page

Lang v. Long-Term Disability Plan, 125 F.3d 794 (9th Cir. 1997) 8, 18

Manny v. Cent. States, Southeast & Southwest Areas Pension & Health & Welfare Funds, 388 F.3d 241 (7th Cir. 2004) 12

McDaniel v. Chevron Corp., 203 F.3d 1099 (9th Cir. 2000) 18

Mers v. Marriott International Group Accidental Death & Dismemberment Plan, 144 F.3d 1014 (7th Cir. 1998) 20, 22

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co., 514 U.S. 645 (1995) 18

Nord v. Black & Decker Disability Plan, 296 F.3d 823 (9th Cir. 2002), *vacated by*, 538 U.S. 822 (2003) 19, 20

Pagan v. NYNEX Pension Plan, 52 F.3d 438 (2d Cir. 1995) 10, 14, 20

Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan, 195 F.3d 975 (7th Cir. 2000) 20, 25

Peruzzi v. Summa Medical Plan, 137 F.3d 431 (6th Cir. 1998) 11

Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41 (1987) 27

Pinto v. Reliance Standard Life Insurance Co., 214 F.3d 377 (3rd Cir. 2000) 12, 20

Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81 (2002) 25

TABLE OF AUTHORITIES – Continued

Page

Regula v. Delta Family-Care Disability Survivorship Plan, 266 F.3d 1130 (9th Cir. 2001) 19

Schaffer v. Weast, ___ U.S. ___, 126 S. Ct. 528 (2005) 23

Schikore v. BankAmerica Supplemental Retirement Plan, 269 F.3d 956 (9th Cir. 2001) 9, 19

Estate of Shockley v. Alyeska Pipeline Serv. Co., 130 F.3d 403 (9th Cir. 1997) 18

Snow v. Standard Insurance Co., 87 F.3d 327 (9th Cir. 1996) 18

Sullivan v. LTV Aero. & Defense Co., 82 F.3d 1251 (2d Cir. 1996) 23

Tremain v. Bell Industrial, 196 F.3d 970 (9th Cir. 1999) 8, 18

Varity Corp. v. Howe, 516 U.S. 489 (1996) 26, 27

Vega v. National Life Insurance Services, 188 F.3d 287 (5th Cir. 1999) 12

Wallace v. Reliance Standard Life Insurance Co., 318 F.3d 723 (7th Cir. 2003) 20

Woo v. Deluxe Corp., 144 F.3d 1157 (8th Cir. 1998) 11

Wright v. R. R. Donnelley & Sons Co. Group Benefits Plan, 402 F.3d 67 (1st Cir. 2005) 22

Zavora v. Paul Revere Life Insurance Co., 145 F.3d 1118 (9th Cir. 1998) 18

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES:

28 U.S.C. § 1254(1) 1

29 U.S.C.
§ 1001b(c)(5) 27
§ 1102(c) 2, 16
§ 1104(a)(1) 26
§ 1106 16
§ 1107 16
§ 1107(a) 2
§ 1108(c) 2
§ 1108(c)(3) 16
§ 1114 2
§ 1132(a) 4

OTHER SOURCES:

H. R. Rep. No. 533, 93d Cong., 2nd Sess. 1, reprinted in 1974 U.S.C.C.A.N. 4639 27

Issues in the Third Circuit Reconciling the ERISA Fiduciary's Dual Responsibilities: An Overview of the Inconsistency Among the Circuits Concerning the Conflict of Interest Analysis Applied in an ERISA Action with an Emphasis on the Eighth Circuit's Adoption of the Sliding Scale Analysis in *Woo v. Deluxe Corporation*, 75 North Dakota L.R. 815 (1999) 8

Kennedy, *Judicial Standard of Review in ERISA Benefit Decisions*, 50 American University L. Rev. 1083 (2001) 8

TABLE OF AUTHORITIES – Continued

Page

McCormick on Evidence § 337, at 412 23

C. Mueller & L. Kirkpatrick, *Evidence* § 3.1 (3d ed. 2003) 23

Restatement (Second) of Trusts § 187, Comment *d* (1959) 6, 8, 10, 11, 15

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Metropolitan Life Insurance Company, respectfully petitions for a writ of certiorari to review the January 6, 2006 decision of the United States Court of Appeals for the Ninth Circuit, which, following prior Ninth Circuit precedent, placed the burden of proof on an ERISA claims administrator to prove that a conflict of interest did not affect its decision on a benefit amount, held that the administrator's decision should have been reviewed *de novo* and entered judgment against the administrator.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit reversing the decision of the United States District Court for the Central District of California is not reported and is reproduced in the Appendix. (App. 1) That decision, however, followed and applied the standard of review mandated by the Ninth Circuit's decision in *Atwood v. Newmont Gold Co.*, 45 F.3d 1317 (9th Cir. 1995). The opinion of the District Court is not reported and is reproduced in the Appendix. (App. 5)

JURISDICTION

The judgment of the Court of Appeals was entered on January 6, 2006 and the time for filing this petition was extended by Justice Ginsburg to May 8, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The Employee Retirement Income Security Act of 1974, as amended ("ERISA"), provides in pertinent part:

> Any employee benefit plan may provide – (1) that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator).

29 U.S.C. § 1102(c).

> Except as otherwise provided in this section and section 1114 of this title:
>
> (1) A plan may not acquire or hold –
>
> (A) any employer security which is not a qualifying employer security, or
>
> (B) any employer real property which is not qualifying employer real property.

29 U.S.C. § 1107(a).

> Nothing in section 1106 of this title shall be construed to prohibit any fiduciary from – . . .
>
> (3) serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.

29 U.S.C. § 1108(c).

STATEMENT

1. Respondent, Peggy Hawkins-Dean, claimed long-term disability benefits under an ERISA-regulated plan

provided by her employer, Robert Half International. She requested monthly disability benefits based on her 1998 wages of $28,850 and her 1998 receipts of $123,004.97 from stock sold just prior to applying for disability benefits. (SR 120-131[1]) She obtained the stock from stock options she was granted in prior years by her employer. (SR 123-140) The Summary Plan Description provides that her basic monthly benefit is 60% of the monthly average of "your earnings, including overtime and bonuses, for the prior calendar year as reported by the Employer on Wage Form W-2. . . . " (SR 9) Respondent's 1998 W-2 does not contain the word "earnings" but, as required by federal law, did include the amounts from the sale of stock obtained through the stock option plan. (R 132)

The disability plan vests discretion in the claims administrator, Metropolitan Life Insurance Company ("MetLife"), "to interpret the terms of the plan and to determine eligibility for and entitlement to Plan benefits in accordance with the terms of the Plan." (SR 69)

Respondent claimed that she could no longer work as a result of fibromyalgia. (SR 75) Respondent's claim, which contained only documentation concerning subjective pain complaints, was denied due to a lack of objective medical findings and medical tests supporting the conclusion of total disability. (SR 97-98)

On November 19, 2001, Respondent appealed the denial of her claim by filing a Complaint in the United

---

[1] References to the Appellant's Excerpts of Record to the Ninth Circuit are preceded by an "R"; references to the Appellee's Supplemental Excerpts of Record to the Ninth Circuit are preceded by an "SR."

States District Court for the Central District of California, pursuant to 29 U.S.C. § 1132(a). The parties briefed cross-motions for summary judgment, at which time Petitioner informed the District Court that, in an effort to resolve the claim, it had agreed to place Respondent in "pay status" on her claim and pay any back benefits that were then due. (SR 153-155) The District Court granted Respondent's Motion for Summary Judgment on the issue of liability and denied her motion as to the calculation of benefits, instead granting Petitioner's Motion for Summary Judgment on that issue and agreeing with Petitioner that the calculation of benefits must be remanded to the Plan administrator. (*Id.*) In doing so, the District Court concluded that the Plan administrator was entitled to determine whether stock receipts constitute "Basic Monthly Earnings" under the terms of the Plan as argued by Respondent. (*Id.*)

Petitioner, relying upon information from the employer that it did not treat income from the sale of stock as earnings under any of the employer's benefit plans (SR 115-118, 141-144A), made a determination that income from the sale of company stock was not "earnings, including overtime and bonuses, for the prior Calendar Year" and did not include that amount in its determination of the monthly benefit amount. (SR 135-138)

Respondent again sought review from the District Court by initiating another lawsuit on February 18, 2003. At the conclusion of discovery, Petitioner and Respondent made cross-motions for summary judgment. On January 29, 2004, the District Court denied both motions and granted judgment on the record for Petitioner, finding that the administrator had not abused its discretion in determining the monthly benefit amount when it excluded

Respondent's 1998 receipts from the sale of her stock. (App. 5)

2. Respondent appealed the decision to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit Panel, without finding any clear error in the District Court's findings of fact, overruled the District Court's decision and ordered judgment for Respondent. (App. 1) In so doing, the Panel applied the Ninth Circuit's "presumptively void" standard of review to the administrator's benefits decision. *Atwood v. Newmont Gold Co.*, 45 F.3d 1317 (9th Cir. 1995). The Panel found the administrator, as the insuring entity, had an inherent conflict of interest and that its prior denial of benefits was material, probative evidence tending to show an actual conflict of interest. The Panel then held that the burden of proof shifted to the Petitioner to prove that a conflict did not affect its monthly benefit amount decision. (App. 1) The Petitioner relied upon evidence showing that the stock had been received in calendar years prior to 1998 (R 120-134) and that the company practice was to exclude receipts from the sale of stock in determining monthly disability benefits. (SR 115-118, 141-144A) However, the Panel, making no reference to the Petitioner's evidence, found that its decision was tainted by an actual conflict.[2] The Panel then reviewed the record *de novo* and, based on the doctrine of *contra proferentem*, found that the earnings for the prior calendar year included the receipts from the sale of stock. (App. 1) The effect of the Ninth Circuit's decision is that Respondent's base income for calculation of her

[2] The Panel failed to follow prior Ninth Circuit precedent that requires that the court review "underlying facts for clear error." *Friedrich v. Intel Corp.*, 181 F.3d 1105, 1109 (9th Cir. 1999).

monthly disability benefit is inflated to $151,855 a year from $28,850 a year.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision is the latest manifestation of a mature, deep and acknowledged conflict between the Ninth and Eleventh Circuits and the other regional courts of appeal on two important questions in ERISA employee-benefits law. The first is whether a court may review *de novo* the benefit decision by an ERISA-regulated administrator, that has been granted discretion by the plan, where there is the appearance of a conflict of interest. On that issue, the Ninth and Eleventh Circuits hold that where an ERISA administrator has a conflict of interest, its decision is presumptively void and must be reviewed *de novo*. In direct conflict, the First, Second, Fourth, and Sixth Circuits hold that in the case of a conflict of interest, the claim administrator's decision must be reviewed under a deferential Restatement of Trusts § 187 "reasonableness" standard that considers the conflict as a factor to be weighed by the court; the Third, Fifth, Seventh, Eighth and Tenth Circuits hold that such a decision must be reviewed under a "sliding scale" approach that considers the severity of the conflict.

The second related issue is whether an ERISA administrator has the burden of proof to establish that its decision was not tainted by a conflict of interest. Here again, the regional courts of appeal are divided in an entrenched split of authority. The Ninth and Eleventh Circuits hold that if the plaintiff offers "material, probative evidence tending to show a conflict of interest," the

administrator has the burden of establishing that its decision was not tainted by a conflict of interest. In direct conflict with the Ninth and Eleventh Circuits, the First, Second, Fourth, Fifth, Seventh and Tenth Circuits hold that the party challenging the benefit decision has the burden of proving that the administrator's decision was affected by a conflict of interest.

On both of these issues, the Ninth Circuit's decision conflicts with this Court's decision in *Firestone v. Bruch,* 489 U.S. 101, 115 (1989). There, the Court held that the standard of review of an ERISA administrator's decision, where the administrator has been given discretion by the plan, is **always** for abuse of discretion and not *de novo.* The Court also said that an alleged conflict of interest is weighed as merely one of six factors in determining whether an administrator has abused its discretion and not as the only factor. The Ninth Circuit departed from these teachings both in applying a *de novo* standard and in imposing the burden of proof on the administrator to prove a negative, i.e., that its decision was not tainted by conflict.

Each of these issues demands this Court's resolution, and this case provides an excellent vehicle with which to do so.

I. The Ninth Circuit's "Presumptively Void" Standard Of Review Warrants This Court's Review.

In *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 115 (1989), this Court stated,

> Of course, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be

> weighed as a 'facto[r] in determining whether there is an abuse of discretion.' Restatement (Second) of Trusts § 187, Comment *d* (1959).

Interpreting this sentence, the Ninth and Eleventh Circuits have adopted the "presumptively void"[3] standard of review. In the Ninth Circuit, if a beneficiary of an ERISA plan provides "material, probative evidence" tending to show a conflict of interest, then the administrator "must rebut the presumption by producing evidence to show that the conflict of interest did not affect its decision to deny or terminate benefits." If the administrator fails to prove a negative – i.e., that the conflict did **not** affect its decision – its decision is void and the court reviews the benefit determination *de novo*. *Atwood v. Newmont Gold Co.*, 45 F.3d 1317, 1323 (9th Cir. 1995); *Brown v. Blue Cross & Blue Shield, Inc.*, 898 F.2d 1566, 1567 (11th Cir. 1990).

The Ninth Circuit, moreover, has held that "material, probative evidence tending to show a conflict" includes such things as: inconsistent reasons for denying benefits, *Lang v. Long-Term Disability Plan,* 125 F.3d 794, 799 (9th Cir. 1997); failure to follow internal procedures, *Friedrich v. Intel Corp.*, 181 F.3d 1105, 1110 (9th Cir. 1999); inadvertent use of the wrong plan's disability definition, *Tremain v. Bell Indus.*, 196 F.3d 970, 977 (9th Cir. 1999); and refusal to

---

[3] This is the name attached to this standard of review by commentators. *See Issues in the Third Circuit Reconciling the ERISA Fiduciary's Dual Responsibilities: An Overview of the Inconsistency Among the Circuits Concerning the Conflict of Interest Analysis Applied in an ERISA Action with an Emphasis on the Eighth Circuit's Adoption of the Sliding Scale Analysis* in *Woo v. Deluxe Corporation*, 75 North Dakota L.R. 815, 853 (1999); Kennedy, *Judicial Standard of Review in ERISA Benefit Decisions*, 50 American University L. Rev. 1083, 1158 (2001).

accept a claim based on the date it was received rather than on the date it was mailed. *Schikore v. BankAmerica Supplemental Ret. Plan*, 269 F.3d 956, 961 (9th Cir. 2001). In this case, despite its recognition that MetLife had discretionary authority and the fact that the District Court had remanded the benefit amount issue to MetLife for determination, the Ninth Circuit found "MetLife's denial and subsequent concession of eligibility for disability benefits was material, probative evidence tending to show that MetLife's decision regarding the amount of benefits due to Hawkins-Dean was affected by self-interest." (App. 1)

The Ninth Circuit's "presumptively void" rule applies equally to all plans where the administrator is connected to the funding source regardless of the type of plan, the administrator, or the method of funding. The Ninth Circuit's rationale for the rule is that, "[u]nder the common law of trusts, any action taken by a trustee in violation of a fiduciary obligation is presumptively void." *Atwood*, 45 F.3d at 1323.

As the Ninth Circuit acknowledged in *Atwood*, there is a conflict in the Circuits as to the appropriate standard of review. *Id.* Moreover, the Ninth Circuit's approach is contrary to Congress's understanding in enacting ERISA and to this Court's decision in *Firestone*. The issue demands definitive resolution by this Court.

A. The Ninth Circuit's Decision Squarely Conflicts With Decisions In Nine Other Circuits.

All of the Circuits state that where an ERISA fiduciary has discretionary authority, a reviewing court must apply either an arbitrary and capricious or an abuse of

discretion standard of review.[4] However, at that point the Circuits diverge. In general, where a conflict of interest has been alleged, there are at least three distinct and conflicting standards of review.

Restatement of Trusts § 187 Standard. Consistent with Section 187 of the Restatement, the First, Second, Fourth, and Sixth Circuits review the claim administrator's decision for reasonableness. In *Doe v. Travelers Ins. Co.*, 167 F.3d 53, 57 (1st Cir. 1999), for example, the First Circuit declined to review an administrator's benefit decision *de novo* and held:

> The essential requirement of reasonableness has substantial bite itself where, as here, we are concerned with a specific treatment decision based on medical criteria and not some broad issue of public policy.

Similarly, the Second Circuit has held "the existence of such an alleged conflict does not operate to change the standard of review, but rather becomes 'a factor in determining whether there is an abuse of discretion,'" and "a reasonable interpretation of the Plan will stand unless the participants can show not only that a potential conflict of interest exists, . . . but that the 'conflict affected the reasonableness of the Committee's decision.'" *Pagan v. NYNEX Pension Plan*, 52 F.3d 438, 442-43 (2d Cir. 1995).

---

[4] *Block v. Pitney Bowes, Inc.*, 952 F.2d 1450, 1454 (D.C. Cir. 1992) (Ginsburg, J.) ("The distinction, if any, between 'arbitrary and capricious review' and review for 'abuse of discretion' is subtle."); *Ass'n of Data Processing Service Organizations, Inc. v. Board of Governors of Federal Reserve System*, 745 F.2d 677, 684 (D.C. Cir. 1984) (Scalia, J.) (distinction between substantial evidence test and arbitrary or capricious test is "largely semantic").

The Fourth Circuit likewise holds that a conflict of interest is one of eight factors for evaluating the reasonableness of the administrator's decision and may reduce the deference afforded the administrator. *Booth v. Wal-Mart Stores Inc.*, 201 F.3d 335, 342-43, n.2 (4th Cir. 2000). And the Sixth Circuit holds that the conflict of interest inherent in self-funded plans does not alter the standard of review, but "should be taken into account as a factor in determining whether the decision was arbitrary and capricious." *Peruzzi v. Summa Med. Plan*, 137 F.3d 431, 433 (6th Cir. 1998).[5]

If the Ninth Circuit had applied a Restatement § 187 reasonableness review, the Panel would have had to have concluded, as did the District Court, that the Petitioner's decision – i.e., that profits received from the sale of stock granted through a stock option plan in the five years before the prior calendar year were not "earnings from . . . the prior calendar year" – was reasonable.

The Sliding Scale Standard. The Third, Fifth, Seventh, Eighth and Tenth Circuits apply a more demanding "sliding scale" standard in which the reviewing court intensifies its scrutiny of the administrator's decision as the seriousness of the conflict increases. For example, in *Woo v. Deluxe Corp.*, 144 F.3d 1157, 1161 (8th Cir. 1998), the Eighth Circuit held that "a reviewing court will always review for an abuse of discretion, but it will decrease the

[5] The D.C. Circuit has not ruled in a case where an administrator has an actual conflict of interest. The Circuit applies a Restatement § 187 standard of review to claim administrator benefit decisions where no actual conflict is alleged. *Block v. Pitney Bowes, Inc.*, 952 F.2d 1450 (D.C. Cir. 1992).

deference given to the administrator in proportion to the seriousness of the conflict of interest or procedural irregularity."

Similarly, in *Vega v. National Life Ins. Servs.*, 188 F.3d 287, 297 (5th Cir. 1999), the Fifth Circuit considered *en banc* the standard of review of ERISA administrator's decisions and reaffirmed its adherence to the sliding scale standard: "The greater the evidence of conflict on the part of the administrator, the less deferential our abuse of discretion standard will be."

The Seventh Circuit likewise approved the sliding scale approach in *Manny v. Cent. States, Southeast & Southwest Areas Pension & Health & Welfare Funds*, 388 F.3d 241, 243 (7th Cir. 2004) ("It is 'a sliding scale' that requires that judicial review be 'more penetrating the greater is the suspicion of partiality, less penetrating the smaller that suspicion is.'"). And similarly, in *Fought v. UNUM Life Ins. Co. of Am.*, 379 F.3d 997, 1006 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 1972 (2005), the Tenth Circuit approved a sliding scale standard of review stating, "When the plan administrator operates under either (1) an inherent conflict of interest, between its discretion in paying claims and its need to stay financially sound; (2) a proven conflict of interest; or (3) when a serious procedural irregularity exists, and the plan administrator has denied coverage, an additional reduction in deference is appropriate." The Third Circuit also follows the sliding scale approach. *See Pinto v. Reliance Standard Life Ins. Co.*, 214 F.3d 377, 392 (3rd Cir. 2000) ("We adopt the approach of the sliding scale cases.").

If the Ninth Circuit Panel in this case had used a sliding scale approach, it could not have negated the

administrator's discretion and made its own *de novo* decision, but instead would have had to have balanced the administrator's discretion against the degree of conflict. Given that the alleged evidence of conflict was only a change in benefit eligibility and that the administrator's interpretation of the phrase "earnings, including overtime and bonuses, for the prior Calendar Year" was based on a consistent past practice, the Panel would almost certainly have sustained the District Court's decision.

The Presumptively Void Standard. As explained above, in the Ninth and Eleventh Circuits, if a plaintiff alleges that a claim administrator has a conflict of interest and provides "material, probative evidence tending to show a conflict," the administrator's decision is presumptively void. Unless the administrator can overcome the presumption, the court will consider its decision void, grant it no deference and review *de novo*. Even where the court finds the administrator's decision is reasonable, the Ninth and Eleventh Circuits will still review *de novo*.[6]

In this case, the administrator presented evidence that the stock options were received prior to the Plan calculation period, that the employer always excluded receipts from the sale of stock in its calculation of "earnings" under the Plan, and that the administrator's decision was prudently preserving the assets of the Plan for all beneficiaries by fairly calculating benefits based on actual earnings for the prior year, as opposed to granting

---

[6] *See Atwood v. Newmont Gold Co.*, 45 F.3d 1317, 1322 (9th Cir. 1995), citing and adopting the Eleventh Circuit's holding in *Brown v. Blue Cross & Blue Shield, Inc.*, 898 F.2d 1566, 1567 (11th Cir. 1990), that "a wrong but apparently reasonable interpretation is arbitrary and capricious."

windfalls to beneficiaries who go out on total disability shortly after they cash in company stock. Such evidence was apparently ignored by the Ninth Circuit.

B. The Ninth Circuit's Decision Is Contrary To This Court's Decision In *Firestone v. Bruch.*

The Ninth Circuit's presumptively void standard of review permits *de novo* court review of an administrator's benefit decision even where the plan grants discretion to the administrator. Such *de novo* review directly contravenes this Court's decision in *Firestone v. Bruch*, in two respects.

First, the Ninth Circuit's application of *de novo* review contravenes the clear instruction in *Bruch* that the decision of an administrator in whom a plan vests discretion must be reviewed for abuse of discretion. As stated by the Second Circuit in a similar case,

> *Bruch* instructs us, however, that the existence of such an alleged conflict does not operate to change the standard of review, but rather becomes "a factor in determining whether there is an abuse of discretion."

Pagan v. NYNEX Pension Plan, 52 F.3d 438, 442 (2d Cir. 1995).

The Ninth Circuit, in this case as well as others, has used conflict of interest as a test to determine whether to apply an abuse of discretion standard or a *de novo* standard of review. But under *Firestone,* a conflict of interest has no bearing on whether *de novo* review will occur, where, as here, the plan grants the administrator

discretion. If the plan grants discretion, then even a conflicted administrator has discretion. The question is the extent, if any, to which the discretion has been abused.

Second, the Ninth Circuit's decision departs from *Firestone*'s teaching that whether an abuse of discretion has occurred must be determined on the basis of several factors, not just one. *Firestone* referenced the six factors listed in the Restatement (Second) of Trusts § 187, Comment *d* (1959):

> (1) the extent of the discretion conferred upon the trustee by the terms of the trust;
>
> (2) the purposes of the trust;
>
> (3) the nature of the power;
>
> (4) the existence or non-existence, the definiteness or indefiniteness, of an external standard by which the reasonableness of the trustee's conduct can be judged;
>
> (5) the motives of the trustee in exercising the power;
>
> (6) the existence or nonexistence of an interest in the trustee conflicting with that of the beneficiaries.

The Ninth Circuit's approach, by contrast, neither weighs nor considers the first five *Firestone* factors. In applying the presumptively void test here, the only consideration by the Panel was (1) whether the beneficiary had offered material, probative evidence tending to show a conflict and (2) whether the administrator proved that a conflict did not taint its decision. Thus, in this case, the court only considered one factor – conflict – and did not weigh it or compare it to any of the other five factors. Using conflict of

interest to change the standard of review from arbitrary and capricious to *de novo* elevates conflict from merely **one** factor to **the** determining factor. That approach cannot be reconciled with *Firestone*.

C. The Presumptively Void Rule Contravenes Congressional Purpose.

The Ninth Circuit's approach also contravenes Congressional purposes in enacting the statute. Congress was aware of the inherent conflict of interest of claim administrators who were also employers or insurers. Indeed, ERISA specifically provides that "[a]ny employee benefit plan may provide – (1) that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator)." 29 U.S.C. § 1102(c). ERISA thus envisions that a fiduciary "may 'wear two hats,' one of a trustee or fiduciary and one settlor." *Fought v. UNUM Life Ins. Co. of Am.*, 379 F.3d 997, 1005 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 1972 (2005).

Another provision, 29 U.S.C. § 1108(c)(3), implicitly authorizes an officer of the sponsor corporation to serve as a pension plan fiduciary by providing that 29 U.S.C. § 1106 (specifying prohibited transactions) shall not be construed so as "to prohibit any fiduciary . . . from serving as a fiduciary in addition to being an officer, employee agent, or other representative of a party in interest." Further, 29 U.S.C. § 1107 specifically authorizes a plan to acquire stock of the sponsoring corporation. ERISA therefore contemplates that trustees, who may be officers of the sponsoring company, may act on behalf of a plan in spite of traditional conflict of interest law.

In spite of Congress's intent, the presumptively void rule has been justified as a means to discourage employers from appointing their employees and their insurance companies as fiduciary administrators. As the Eleventh Circuit put it, "one reason for limiting the deference when the fiduciary suffers a conflict of interest is to discourage arrangements where a conflict arises." *Brown v. Blue Cross & Blue Shield of Alabama, Inc.*, 898 F.2d 1556, 1564 (11th Cir. 1990). In other words, even though Congress specifically authorized employers and insurance companies to act as ERISA administrators, the presumptively void rule is designed to discourage them from doing so. The Court should grant review to bring the Ninth and Eleventh Circuit's interpretation of ERISA into line with Congress's purposes.

D. The Court's Resolution Of This Issue Is Vital And This Case Is An Ideal Vehicle For Resolving It.

This case provides an excellent opportunity for resolving the conflicts among the circuits about the appropriateness of a *de novo* standard of review of an ERISA administrator's benefit decisions.

First, it will enable the Court to achieve one of ERISA's "principal" goals which was to "establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits." *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001), quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987). When it enacted ERISA, Congress intended

> [T]o ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives . . . requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 656-657 (1995), quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990).

Despite this Congressional purpose, the Ninth and Eleventh Circuits apply a standard of review that conflicts directly with the standards of review used by other circuit courts. "Uniformity is impossible" if different circuits subject decisions by administrators to different legal obligations. *Egelhoff*, 532 U.S. at 148. Because of the split in the circuits, an administrator of a national benefit plan may have the same benefit decision accepted in one or more circuits and rejected by the Ninth Circuit, and will be thereby forced to administer claims according to different standards.

Second, the issues are clear and well developed and the conflict is extensive and mature. The Ninth Circuit has issued over 20 published opinions[7] and 35 unpublished

---

[7] *Snow v. Standard Ins. Co.*, 87 F.3d 327, 330 (9th Cir. 1996); *Lang v. Long-Term Disability Plan of Sponsor Applied Remote Tech.*, 125 F.3d 794 (9th Cir. 1997); *Estate of Shockley v. Alyeska Pipeline Serv. Co.*, 130 F.3d 403, 405 (9th Cir. 1997); *Zavora v. Paul Revere Life Ins. Co.*, 145 F.3d 1118, 1122 (9th Cir. 1998); *Friedrich v. Intel Corp.*, 181 F.3d 1105, 1110 (9th Cir. 1999); *Kearney v. Standard Ins. Co.*, 175 F.3d 1084, 1087 (9th Cir. 1999); *Bendixen v. Standard Ins. Co.*, 185 F.3d 939 (9th Cir. 1999); *Tremain v. Bell Indus.*, 196 F.3d 970 (9th Cir. 1999); *McDaniel v.*

(Continued on following page)

opinions applying its presumptively void standard of review since it decided *Atwood*.

It is not likely that the Circuit will overturn *Atwood* after citing it as precedent for 11 years in over 55 cases. Nor is it likely that the Circuits applying standards that conflict with the Ninth Circuit will have a change of mind and embrace the Ninth Circuit's position. In fact, those Circuits that have reviewed the presumptively void standard of review have specifically rejected it. *Pagan v. NYNEX Pension Plan*, 52 F.3d 438, 442 (2d Cir. 1995) (rejecting presumptively void standard from *Brown v. Blue Cross and Blue Shield of Ala.*, 898 F.2d 1556, 1561-68 (11th Cir. 1990)); *Pinto v. Reliance Std. Life Ins. Co.*, 214 F.3d 377, 391 (3d Cir. 2000) (rejecting the presumptively void rule stating, "The essence of the [presumptively void] approach is that the fiduciary should be accorded deference, but only when deciding between options which are all in the best interest of the beneficiary or beneficiaries."); *Vega v. National Life Ins. Servs.*, 188 F.3d 287, 298 (5th Cir. 1999) (rejecting the presumptively void rule stating, "A rule that permitted such a result would be at odds with

---

Chevron Corp., 203 F.3d 1099 (9th Cir. 2000); *Schikore v. BankAmerica Supplemental Ret. Plan*, 269 F.3d 956, 961 (9th Cir. 2001); *Regula v. Delta Family-Care Disability Survivorship Plan*, 266 F.3d 1130 (9th Cir. 2001), *vacated by*, 539 U.S. 901 (2003); *Nord v. Black & Decker Disability Plan*, 296 F.3d 823 (9th Cir. 2002), *vacated by*, 538 U.S. 822 (2003); *Bergt v. Ret. Plan for Pilots Employed by Mark Air, Inc.*, 293 F.3d 1139, 1142 (9th Cir. 2002); *Alford v. DCH Found. Group Long-Term Disability Plan*, 311 F.3d 955 (9th Cir. 2002); *Jordan v. Northrop Grumman Corp. Welfare Benefit Plan*, 370 F.3d 869, 877 (9th Cir. 2004); *Gatti v. Reliance Std. Life Ins. Co.*, 415 F.3d 978, 985 (9th Cir. 2005); *Boyd v. Bell*, 410 F.3d 1173, 1179 (9th Cir. 2005); *Abatie v. Alta Health & Life Ins. Co.*, 421 F.3d 1053, 1060 (9th Cir. 2005), *rehearing en banc granted, vacated by* 437 F.3d 860 (2006).

the Supreme Court's instruction in *Bruch* to review such determinations under an abuse of discretion standard – a standard that demands some deference be given to the administrator's decision."); *Mers v. Marriott Int'l Group Accidental Death & Dismemberment Plan*, 144 F.3d 1014, 1020 (7th Cir. 1998) ("While some courts have found that a denial of benefits is presumptively void and must be reviewed *de novo* where a similar conflict may exist, . . . we have not"); *Chambers v. Family Health Plan Corp.*, 100 F.3d 818, 826 (10th Cir. 1996) ("We reject the 'presumptively void' test as inconsistent with our holding in *Pitman* and the Supreme Court's dictum in *Firestone*.").

Third, the lower courts have expressed a desire for further guidance in interpreting *Firestone*. For example, as stated in *Pinto v. Reliance Std. Life Ins. Co.*, 214 F.3d 377, 383 (3d Cir. 2000), "[s]ince *Firestone*, courts have struggled to give effect to this delphic statement, and to determine both what constitutes a conflict of interest and how a conflict should affect the scrutiny of an administrator's decision to deny benefits." As stated by the Seventh Circuit, "Judges understand deferential and non-deferential review, but intermediate variations blur into one another without promoting understanding or consistent adjudication." *Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan*, 195 F.3d 975, 981 (7th Cir. 1999). The Second Circuit echoed this concern when it expressed the hope that "[p]erhaps the Supreme Court will have an opportunity to reconsider this issue." *Pagan v. NYNEX Pension Plan*, 52 F.3d 438, 442 (2d Cir. 1995). *See also*, e.g., *Wallace v. Reliance Std. Life Ins. Co.*, 318 F.3d 723, 724 (7th Cir. 2003) (expressing expectation that the Court would resolve this issue in *Nord v. Black & Decker Disability Plan*, 538 U.S. 822 (2003)).

Given the conflict among the circuits, the desire for further guidance, and the vast amount of time being spent on these issues by the circuit and district courts, there is no reason to let this issue remain unresolved any longer.

II. The Ninth Circuit's Rule Shifting The Burden Of Proof Likewise Merits This Court's Review.

This case also presents a second, related issue that independently warrants review. In the Ninth Circuit, once a beneficiary offers evidence "tending to show" a conflict, the burden of proof shifts to the administrator to prove that its decision was not tainted. *Atwood v. Newmont Gold Co.*, 45 F.3d 1317, 1323 (9th Cir. 1995). The administrator can attempt to prove that its decision was not affected by the conflict or that it was based on information by a reliable source or that it has made the same decision in all previous cases or that the decision was in the best interest of all of the plan participants even though it was detrimental to the participant. However, even that may not be enough. In this case, there was evidence that Respondent had received the stock in years prior to the relevant year (R 120-134), that the company never included receipts from the sale of stock in its monthly benefit calculation (SR 115-118, 141-141A), and that such a calculation would increase the income of the Plaintiff **significantly** compared to pre-disability earnings. Yet, the Panel still found that an actual conflict existed, reviewed *de novo*, and found the Petitioner's decision to be wrong. As shown below, the Ninth Circuit's burden-shifting approach conflicts with the rules applied in other circuits as well as with Congress's purposes and this Court's prior decisions. And here again, the issue demands this Court's review.

A. The Ninth Circuit's Rule Shifting The Burden To The Claim Administrator Is In Direct Conflict With Decisions Of Six Other Circuits.

Only the Ninth and Eleventh Circuits place the burden of proof on the administrator to show that its decision was not tainted by conflict. The Second Circuit has expressly rejected the burden shifting approach applied by the Ninth Circuit in *Atwood*, and the Eleventh Circuit in *Brown. Sullivan v. LTV Aero. & Defense Co.*, 82 F.3d 1251, 1259 (2d Cir. 1996). The First, Fourth, Fifth and Seventh Circuits have come to the same conclusion. *See*, e.g., *Wright v. R. R. Donnelley & Sons Co. Group Benefits Plan*, 402 F.3d 67, 74 n.4 (1st Cir. 2005) (The burden is on the claimant to demonstrate a conflict of interest.); *Colucci v. Agfa Corp. Severance Pay Plan*, 431 F.3d 170, 179-80 (4th Cir. 2005) (where a corporation also collaterally manages the plan, the plaintiff must prove that the administrator acted unreasonably and that the conflict of interest affected the benefits decision); *Ellis v. Liberty Life Assur. Co.*, 394 F.3d 262, 270 (5th Cir. 2004) ("an ERISA plaintiff must come forward with evidence that a conflict exists . . . and that any reduction in the degree of our deference depends on such evidence"); *Mers v. Marriott Int'l Group Accidental Death & Dismemberment Plan*, 144 F.3d 1014, 1020 (7th Cir. 1998) (Claimant has burden to show "by providing specific evidence of actual bias that there is a significant conflict.").

The Tenth Circuit in *Fought v. UNUM Life Ins. Co. of Am.*, 379 F.3d 997, 1006 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 1972 (2005), has recently adopted a hybrid in which the burden of proof on reasonableness of its decision is on the fiduciary, but the burden of proof with regard to the

conflict of interest remains with the participant. Thus, the conflict between the Ninth Circuit and other Circuits on this issue is also wide, deep, and mature.

B. The Ninth Circuit's Shift Of The Burden Of Proof To The Claim Administrator Conflicts With Common Law.

The Ninth Circuit's approach is also contrary to the common law of evidence. "The burdens of pleading and proof with regard to most facts have and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure or proof or persuasion." *McCormick on Evidence* § 337, at 412. As one commentator put it, "perhaps the broadest and most accepted idea is that the person who seeks court action should justify the request, which means that the plaintiffs bear the burdens on the elements in their claims." C. Mueller & L. Kirkpatrick, *Evidence* § 3.1, p. 104 (3d ed. 2003). Accordingly, as the Second Circuit explained in *Sullivan v. LTV Aero. & Defense Co.*, 82 F.3d 1251 (2d Cir. 1996), the Ninth Circuit's burden-shifting approach "is contrary to the traditional burden of proof in a civil case."

This Court reviewed this same issue in the recent case of *Schaffer v. Weast*, ___ U.S. ___, 126 S. Ct. 528, 534-35 (2005). In that case, the Court considered whether the parents or the school district bore the burden of persuasion (burden of proof) at a hearing on an individual education program for a learning disabled child. The Court found that while the underlying statute required a hearing, it did not state which party had the burden of proof. In the absence of statutory language, this Court said that

it should "begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims." The Court reviewed other federal statutes which are silent on the burden of proof, including Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Securities Exchange Act and the Endangered Species Act, and found that it had required or assumed in each of those cases that the plaintiff had the burden of proof. The Court concluded that "[a]bsent some reason to believe that Congress intended otherwise, therefore, we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief." *Id.*

There is no statutory provision in ERISA regarding which party bears the burden of proof of a conflict of interest. In the absence of any Congressional action to place the burden of proof on the claim administrator, the common law rule should be the default here as well.

C. The Ninth Circuit's Categorical Rule Contravenes Congressional Goals And Is Based Upon Unsupported Generalizations.

The Ninth Circuit's burden-shifting regime also contravenes Congress's goals in enacting ERISA. One of the statute's principal goals is to enable employers "to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987). Yet given the existing conflict in the circuits, in the Ninth and Eleventh Circuit claim administrators must bear the burden of proving that they are not conflicted while in the rest of the nation the burden remains with the plaintiff.

Administrators also face the reality that in the Ninth Circuit any change in position, any modification of benefit entitlement or benefit amount will shift the burden of proof to them to prove that their entire benefit determination was not tainted by conflict. *See supra* at 7-8. For both of these reasons, the Ninth Circuit's burden-shifting scheme means that benefit decisions that would have been approved in other circuits will be overturned by the Ninth Circuit.

In addition, the Ninth Circuit's burden-shifting rule is a categorical rule that is based upon unsupported generalizations. In *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93 (2002), this Court said where "generalizations fail to hold in the run of cases . . . the justification for the categorical rule disappears." Here, there is no rational basis for a categorical rule that shifts the burden to the ERISA-regulated administrator to prove a negative – that its decision was not affected by a conflict. To the contrary, the Ninth Circuit's rule stereotypes insurance company administrators by assuming that they will inevitably place their own interests over the interests of the beneficiary. In many cases, an insurance company administrator may not have any self-interest. As the Seventh Circuit noted, an insurance company administrator "may not have any stake in the decision. . . . For many large firms, health and disability insurance on their labor forces is retrospectively rated. This means that the employer agrees to reimburse the insurer for all outlays, plus a loading charge and administration fee. We have no reason to think that [the company's] benefits staff is any more 'partial' against applicants than are federal judges when deciding income-tax cases." *Perlman v. Swiss Bank Corp. Comprehensive*

Disability Protection Plan, 195 F.3d 975, 981 (7th Cir. 2000).

A number of courts have rejected the categorical generalization that insurance company administrators will act in their own self-interest in making benefit decisions.

> Although MetLife acts as both administrator and insurer of the plan, that factor, standing alone, does not constitute a conflict of interest. *See Chalmers v. Quaker Oats Co.*, 61 F.3d 1340, 1344 (7th Cir. 1995). Indeed, it has not been demonstrated that MetLife has a direct stake, in terms of its own financial health, in the outcome of this issue of interpretation. *See Cuddington v. Northern Ind. Pub. Serv. Co.*, 33 F.3d 813, 816 (7th Cir. 1994) (refusing to find a conflict on a similar theory absent "specific evidence showing that the [claim administrator] had a conflict of interest").

Cozzie v. Metropolitan Life Ins. Co., 140 F.3d 1104, 1108 (7th Cir. 1998).

Moreover, courts have recognized that a fiduciary, such as Petitioner, owes a duty not just to the participant who is seeking benefits, but also to the Plan as a whole. *Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996); 29 U.S.C. § 1104(a)(1)(A). Plan fiduciaries cannot pay all claims regardless of merit, because if they do, premiums or contributions will have to rise – increasing costs to all participants. This principle is particularly applicable here, where Plaintiff seeks to increase her disability benefits five-fold based on her sale of stock obtained in prior years through the stock option plan. In this case, disability benefits were provided by the employer and underwritten by the insurer based on annual compensation provided and controlled by the employer. The Ninth Circuit's

decision permits the employee to control the amount of her own monthly disability benefit through her sale of stock in her stock option plan. No benefit plan, whether self funded or fully insured, could be reliably underwritten to plan for disability benefits where the employee controls the monthly benefit amount.

There is nothing in ERISA that justifies placing the burden of proof on an administrator to prove that its decision was not affected by a conflict of interest. ERISA was passed not only to protect the rights of beneficiaries but also to encourage employers to create and maintain voluntary benefit plans, *see* H. R. Rep. No. 533, 93d Cong., 2nd Sess. 1, reprinted in 1974 U.S.C.C.A.N. 4639, 4639, *Varity Corp. v. Howe*, 516 U.S. 489 (1996), and "to maintain the premium costs of [the ERISA] system at a reasonable level." 29 U.S.C. § 1001b(c)(5). This Court has emphasized both "the public interest in encouraging the formation of employee benefit plans" and "the need for prompt and fair claims settlement procedures." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987). In *Varity Corp.*, 516 U.S. at 497, the Court pointed out that courts should take into account Congress's "desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans." Requiring a claim administrator to prove that its benefit decisions was not tainted by conflict in every case where it changes its decision, makes an administrative error, or is just mistaken encourages litigation, increases plan costs, and may decrease the benefits available to other plan participants. It also discourages employers from establishing plans. And as noted, requiring companies to take into account windfall income from the exercise of stock options discourages the

formation of such plans because the vagaries of the stock market are impossible to predict, as is the cumulative value of years of stock options.

Finally, the Ninth Circuit's approach discourages administrators from reviewing their decisions and correcting mistakes when they find them. As noted, under the Ninth Circuit's burden-shifting approach, any change of mind or error in Plan administration puts the administrator at risk of proving that its decisions were not affected by a conflict of interest. In this case, for example, the administrator reviewed its benefit eligibility decision and reversed its prior finding that the beneficiary was not entitled to any benefits before the district court had ruled on the issue. (SR 135-138, 141-144A) In other words, the administrator decided to pay benefits without the need for a court ruling, yet the Ninth Circuit found that change in decision, by itself, was material, probative evidence tending to show a conflict of interest and on that basis alone placed the burden of proof on the administrator to show that its decision was not tainted. (App. 1) Rather than encouraging administrators to review decisions, the Ninth Circuit's approach discourages ERISA administrators from correcting honest mistakes and reviewing their prior decisions.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

GENE C. SCHAERR
WINSTON & STRAWN LLP
1700 K Street, N.W.
Washington, D.C. 20006
(202) 282-5000

LINDA T. COBERLY
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600

AMY K. POSNER
METROPOLITAN LIFE
INSURANCE COMPANY
27-01 Queens Plaza North
Long Island City,
New York 11101
(212) 578-8296

LEE T. PATERSON
Counsel of Record
AMANDA SOMMERFELD
WINSTON & STRAWN LLP
333 South Grand Avenue
Los Angeles, California 90071
(213) 615-1700

Counsel for Petitioner

APPENDIX TABLE OF CONTENTS

Page

A Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit (January 6, 2006).....App. 1

B Judgment in the United States Court of Appeals for the Ninth Circuit (January 6, 2006).....App. 4

C Order of the United States District Court, Central District of California, Case No. CV 03-1115 ER (January 28, 2004).....App. 5

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PEGGY HAWKINS-DEAN, Plaintiff-Appellee, vs. METROPOLITAN LIFE INSURANCE COMPANY, a Corporation Defendant-Appellants. and ROBERT HALF INTERNATIONAL, INC., an ERISA Plan Defendant	No. 04-55277 D.C. No. CV-03-01115-ER MEMORANDUM* (Filed Jan. 6, 2006)

Appeal from the United States District Court
for the Central District of California,
Edward Rafeedie, District Judge, Presiding

Argued and Submitted November 15, 2005
Pasadena, California

Before: WARDLAW and PAEZ, Circuit Judges, and SINGLETON, District Judge.**

---

* This disposition is not appropriate for publication and may not be cited except as may be provided by Ninth Circuit Rule 36-3.

** The Honorable James K. Singleton, Senior District Judge for the District of Alaska, sitting by designation.

Appellant Peggy Hawkins-Dean was employed by Robert Half International ("RHI") and was enrolled in RHI's Long-Term Disability Benefits Plan ("the Plan"). The Plan is funded by a group policy issued by Metropolitan Life Insurance Company ("MetLife") to RHI and is governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* This matter was originally before the district court in a separate action regarding Hawkins-Dean's entitlement to long-term disability benefits under the Plan. MetLife denied Hawkins-Dean's benefits claim, and she brought suit. Before the district court ruled on the parties' motions for summary judgment, MetLife admitted Hawkins-Dean's benefits eligibility, leaving only the amount of benefits in question. The district court remanded the matter to MetLife to determine the amount of monthly benefits due to Hawkins-Dean. MetLife calculated the amount of benefits as 60% of Hawkins-Dean's earnings, not including stock options she received from RHI. This resulted in an amount significantly lower than Hawkins-Dean anticipated, and she again filed suit.

Faced with this controversy, the district judge held that MetLife, as the Plan administrator, did not abuse its discretion in calculating Hawkins-Dean's monthly benefit amount. The district judge correctly determined that under the terms of the Plan, MetLife, as the Plan administrator, had discretion to make disability and benefit determinations. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). We conclude, however, that MetLife's denial and subsequent concession of eligibility for disability benefits was material, probative evidence tending to show that MetLife's decision regarding the amount of benefits due to Hawkins-Dean was affected by

self-interest. *See Atwood v. Newmont Gold Co.*, 45 F.3d 1317, 1322-23 (9th Cir. 1995). Because MetLife did not demonstrate that the benefits amount decision was made in furtherance of its fiduciary duties, the district court should have reviewed the benefits amount determination de novo.

Ordinarily this conclusion would require remand to allow the district court to consider the evidence under the appropriate standard of review. Based on the record in this case and the doctrine of *contra proferentem*, however, we conclude that Hawkins-Dean is entitled to monthly benefits based on her total earnings, including earnings from stock options, as reported on her W-2 form. Remand, therefore, will be for an award of benefits consistent with this disposition.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PEGGY HAWKINS-DEAN, Plaintiff-Appellant, v. METROPOLITAN LIFE INSURANCE COMPANY, a Corporation Defendant-Appellee, and ROBERT HALF INTERNATIONAL, INC., an ERISA Plan, Defendant.	No. 04-55277 D.C. No. CV-03-01115-ER **JUDGMENT**

Appeal from the United States District Court for the Central District of California, Los Angeles.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **REVERSED, REMANDED.**

Filed and entered 01/06/06

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL, DISTRICT OF CALIFORNIA

PEGGY HAWKINS-DEAN Plaintiff, v. **METROPOLITAN LIFE INS. CO. AND ROBERT HALF INTERNATIONAL, INC.** Defendant.	Case No. CV03-1115-ER (VBKx) **ORDER DENYING CROSS MOTIONS FOR SUMMARY JUDGMENT AND GRANTING JUDGMENT ON THE ADMINISTRATIVE RECORD TO DEFENDANT METROPOLITAN LIFE INSURANCE COMPANY** **(FILED 11/17/03 AND 12/29/03)**

Having read and considered the papers filed in connection with the parties' cross motions for summary judgment and cross motions for judgment on the administrative record. The Court also heard oral argument on January 26, 2004, the Court has come to the following **CONCLUSIONS:**

[1] The Court begins by noting that the arguments raised by the Plaintiff at the January 26, 2004 hearing regarding whether the stock options reported on the Plaintiff's 1998 IRS Form W-2 were profits from options exercised in 1998 or were the reported valuation of options granted in that year were not raised in the Plaintiff's memoranda of law related to this motion and cannot be found anywhere in the long and exhaustive administrative record of this dispute. In any event, the argument is

irrelevant to the issue whether the Defendant committed an abuse of discretion in its determination of the amount of disability benefits due to the Plaintiff. Thus, for the reasons stated on the record, in open court, on January 26, 2004, the Court DENIES the cross motions for summary judgment, and the Court GRANTS Defendant MetLife's motion for judgment on the administrative record.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by United States mail or by telefax or by email, copies of this Order on counsel in this matter.

Dated: JAN 27, 2004

/s/ Edward Rafeedie
EDWARD RAFEEDIE
Senior United States
District Judge